No. 87-354

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF ARIZONA, PETITIONER

v.

RONALD WILLIAM ROBERSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the police may interrogate a suspect after he has requested counsel in the course of a separate investigation of an unrelated offense.

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INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was invalid because the police officers who questioned him initiated their interrogation after respondent had previously requested counsel in an unrelated investigation. This case requires the Court to consider whether the principles of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), apply to interrogations conducted in the course of an investigation that is separate from the one in which the suspect has invoked his right to counsel.

The Court's resolution of this case is likely to affect the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements by defendants in federal criminal prosecutions. The problem presented by this case can arise, for example, when federal agents investigate a person who is in state custody and is also the subject of a state criminal investigation. That person may invoke his right to counsel in response to questioning by state investigators, but subsequently agree to

talk to federal agents who are conducting a separate investigation of a different criminal episode. If the rule in *Edwards* were applied in such a case, the statements obtained by the federal investigators would be inadmissible at trial, even though those statements were obtained after the federal agents had advised the suspect of his rights under *Miranda* and the suspect had waived those rights. In our view, the policies underlying the Court's decisions in *Miranda* and *Edwards* do not require the exclusion of voluntary statements made by suspects in such circumstances.

STATEMENT

Respondent was arrested on April 16, 1985, in Tucson, Arizona, at the scene of a burglary. Officer Perez, the arresting officer, gave respondent the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Respondent then stated that he wanted a lawyer before answering any questions (Pet. App. 12; 4/3/86 Tr. 23, 26).[1] Officer Perez did not attempt to question respondent.

Shortly thereafter, Officer Quinn arrived at the scene of the arrest. Officer Quinn had been told that respondent had agreed to give a statement (10/17/85 PM Tr. 8). Quinn confirmed that respondent had been advised of his constitutional rights, and Quinn was told by officers at the scene that respondent was willing to speak with them (*ibid.*). Officer Quinn then spoke briefly with respondent, asking if it was true that respondent was willing to give a statement. Respondent indicated that he was (*ibid.*).

[1] Citations to "4/3/86 Tr." refer to the transcript of the suppression hearing in this case. Citations to "10/17/85 PM Tr." refer to the transcript of the afternoon hearing on motions in respondent's earlier trial. That transcript was made a part of the record in this case (4/3/86 Tr. 59).

Before any interrogation, respondent was taken to the Eastside Police Station in Tucson. There, without objection from respondent, Officer Quinn recorded respondent's statement concerning the April 16 burglary and his drug connections (10/17/85 PM Tr. 9-12). Shortly thereafter, respondent gave another recorded statement to Officer Garrison. Like Officer Quinn, Officer Garrison was not told that respondent had made a request for counsel at the time Officer Perez first gave him the *Miranda* warnings (Pet. App. 20; 4/3/86 Tr. 23-24, 52).

Meanwhile, Detective Cota-Robles, operating out of the Downtown Tucson Police Station, was investigating a burglary that had occurred on April 15, the day before respondent's arrest. Detective Cota-Robles traced a car that had been seen at the site of that burglary to respondent, and he learned that respondent was already in custody at the Eastside Station. Accordingly, Cota-Robles visited respondent in jail on April 19, explained that he wished to discuss the April 15 burglary, and gave respondent complete *Miranda* warnings (4/3/86 Tr. 8-20). Respondent agreed to answer Detective Cota-Robles' questions and did not express any desire to consult an attorney. Cota-Robles then questioned respondent about the April 15 burglary and recorded the interview on a tape recorder (*id.* at 19-20). At some point thereafter, a review of Officer Perez's report of the arrest revealed that respondent had requested an attorney at the time of his arrest in connection with the April 16 burglary.

Respondent was tried first for the April 16 burglary and was convicted. His statements regarding that burglary were admitted at trial only for impeachment purposes (4/3/86 Tr. 27). Respondent was then prosecuted on the charges arising out of the April 15 burglary—the charges at issue in this case. After a hearing, the district court suppressed the statements respondent had made to Detective Cota-Robles concerning the April 15 burglary. The district

court concluded that suppression was required under the Arizona Supreme Court's decision in *State* v. *Routhier,* 137 Ariz. 90, 669 P.2d 68 (1983), cert. denied, 464 U.S. 1073 (1984), even though the Cota-Robles interview was "in no way a fruit of the April 16th violation" (4/3/86 Tr. 50-51).[2] The district court also noted that "nobody is questioning Detective Cota-Robles' motives or his methods. * * * [T]here's nothing wrong with what he had done except for the fact that [respondent] had invoked his right to counsel earlier" (*id.* at 50). Nonetheless, because respondent had asserted his right to counsel at the time of his arrest, the district court held that the fruits of any subsequent interrogation—even interrogation conducted during a separate investigation of a different crime—had to be suppressed.

The district court then granted the State's motion to dismiss the case without prejudice, in order to enable the State to take an appeal of the suppression motion (4/3/86 Tr. 60). The Arizona Court of Appeals affirmed on the basis of the *Routhier* decision (Pet. App. 21-24), and the Arizona Supreme Court denied the State's petition for review (*id.* at 25).[3]

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[2] The *Routhier* case interpreted this Court's decision in *Edwards* v. *Arizona,* 451 U.S. 477 (1981), to require that once a suspect requests counsel, all police-initiated interrogation must cease, including interrogation concerning unrelated offenses.

[3] The State has denominated its petition as one for certiorari to the Arizona Supreme Court. Because that court denied the State's petition for discretionary review, we believe that the petition should be directed to the Arizona Court of Appeals, Division Two. See *Faretta* v. *California,* 422 U.S. 806, 812 (1975). We believe the proper course at this juncture is for the Court to treat the papers in this case as a petition for a writ of certiorari to the Arizona Court of Appeals, Division Two, and to direct the judgment in this case to that court. See *Callender* v. *Florida,* 383 U.S. 270 (1966); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 350-351 & n.61 (6th ed. 1986).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court concluded that custodial interrogation by law enforcement officers generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (*id.* at 467). To combat those pressures, the Court in *Miranda* devised a prophylactic rule that was designed to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process" (*id.* at 469). One of the requirements of the rule created in *Miranda* is that before questioning a suspect in custody, a law enforcement officer must inform him that he has the right to the presence of an attorney (*id.* at 444). If the suspect requests counsel, the *Miranda* Court held, "the interrogation must cease until an attorney is present" (*id.* at 474).

In *Edwards* v. *Arizona,* 451 U.S. 477 (1981), the Court created a new rule to deal with cases in which a request for counsel is made after *Miranda* warnings have been given. The Court in *Edwards* held that when a request for counsel has been made, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" (*id.* at 484-485). *Edwards* established a bright-line, prophylactic rule that, like *Miranda* itself, "provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Oregon* v. *Elstad,* 470 U.S. 298, 307 (1985). The justification given for the new rule was the concern that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois,*

469 U.S. 91, 98 (1984). In light of that concern, the Court has adopted a per se rule barring police interrogation after a request for counsel; the Court has refused to examine the circumstances of each case to determine whether the police-initiated questioning following a request for counsel led to a voluntary waiver of the suspect's rights.

We submit that there is a class of cases—of which the instant one is an example—in which the competing concerns of protecting suspects from police coercion and minimizing interference with legitimate investigative activities require the striking of a different balance from the one struck in *Edwards*. The results of police-initiated interrogation of a suspect who has previously requested counsel should not be suppressed when the new interrogation occurs in the course of an investigation that is independent of the one in which the request for counsel was made. In that setting, where full *Miranda* warnings are given before the new interrogation begins, and where the suspect does not request counsel in connection with the interrogation, the risk of police "badgering" is insubstantial, and the burden on the suspect is minimal. Moreover, unlike the case in which the suspect has decided that he wants to deal with the police through counsel with respect to a particular investigation, there are good reasons that may cause a suspect to decide not to invoke counsel in connection with a different and unrelated investigation. A blanket assumption that a different conclusion on the suspect's part is likely to be the product of police coercion is not justified when separate investigations are involved.

The considerations on the other side of the balance also cut against extending *Edwards* to cases such as this one. Applying the *Edwards* rule to interrogations arising from separate investigations would impose a significantly greater burden on law enforcement than is imposed by applying *Edwards* in the typical single-investigation context.

While all law enforcement officials involved in a single investigation can reasonably be required to be aware that the suspect has requested counsel and to treat him accordingly, it is far more burdensome to require every investigator to determine whether any suspect he questions in custody has previously requested counsel in connection with any unrelated investigation. Moreover, to extend the *Edwards* rule to interrogations occurring in the course of unrelated investigations would deprive the police of an extremely valuable investigative resource—interrogation—without requiring the suspect to indicate in any way that he wishes counsel in connection with the new investigation. Before shutting the door on all such investigative opportunities, we submit that it is not too much to ask that the suspect at least indicate that he wants the door to be shut.

ARGUMENT

THE *EDWARDS* RULE SHOULD NOT BE EXTENDED TO INTERROGATIONS CONDUCTED IN THE COURSE OF SEPARATE INVESTIGATIONS

The rule adopted by this Court in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), prohibits the police from questioning a suspect who has invoked his right to counsel until the suspect obtains counsel, unless the suspect himself initiates discussions with the police. The *Edwards* case and the cases that have applied the *Edwards* rule[4] have all involved interrogations relating to a single criminal episode, conducted in the course of a single criminal investigation. The question in this case is whether the rule in *Edwards* should be extended to prohibit law enforcement officials

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[4] See *Connecticut* v. *Barrett*, No. 85-899 (Jan. 27, 1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); *Solem* v. *Stumes*, 465 U.S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983); *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

from questioning a suspect if the suspect has previously invoked his right to counsel in connection with a separate investigation of a different crime. We submit that it should not. Whatever the benefits of the prophylactic rule of *Edwards* as weighed against its costs to effective law enforcement, the benefits are fewer and the costs are significantly greater when the rule is extended to prohibit police interrogations that take place in the course of separate criminal investigations.

1. The concern that underlies the *Edwards* rule is that absent a strict prohibition against renewed interrogation after a suspect invokes his right to counsel, "an accused in police custody [may be] badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon* v. *Bradshaw,* 462 U.S. 1039, 1044 (1983). That concern is less serious when the suspect is questioned in the course of an entirely separate investigation. In order to justify initiating contact with the suspect, the police must establish that they are in fact conducting a separate investigation. In order to obtain a statement that is admissible at trial, they must obtain a valid waiver of the suspect's right to remain silent and his right to counsel. And, under *Edwards*, they may not initiate further inquiries if the suspect invokes his right to counsel in connection with the second investigation, as he did in connection with the first. To hold that the per se rule of *Edwards* is inapplicable to the initiation of questioning relating to a separate investigation thus does not give the police license to pressure the suspect until he finally gives in and agrees to speak with them.

The extra burden imposed on a suspect by not extending the *Edwards* rule to interrogations that are part of a separate investigation is slight; if the suspect wishes counsel for the new investigation, he must simply assert that right in response to the police questioning. In light of *Edwards*, he will not have been subjected in the original investigation to repeated inquiries about his readiness to

talk to the police, and he will have no reason to doubt that his choice among the options presented by the *Miranda* warnings will be honored. All he is required to do is to advise the investigator that he wishes the assistance of counsel before being questioned in connection with the new investigation.

In a case like *Edwards*, a suspect who requests the assistance of counsel but is then interrogated in spite of his request may assume that the "right" to counsel is not real, or at least that the police have no intention of respecting it. By contrast, in the context of a separate investigation, when a law enforcement officer explains that he is investigating an offense that is unrelated to the offense for which the suspect is being held, there is no reason for the suspect to conclude that if he requests an attorney before answering questions in connection with the new inquiry, his request will be ignored.

The facts of this case illustrate this point. It is reasonably clear that respondent had previously agreed to talk to Officers Quinn and Garrison while knowing that they were unaware of his earlier request for counsel. See 10/17/85 PM Tr. 8 (respondent replied affirmatively to Quinn's inquiry about whether "it was true he was willing to give a statement") and 4/3/86 Tr. 23-24 (prosecutor explains that Garrison inquired of Perez, in respondent's presence, whether respondent had been advised of his rights, and upon being given a simple affirmative answer, then asked respondent whether he wanted to talk). Instead of correcting their misapprehension and informing them that he had requested counsel, respondent simply changed his mind and decided to talk.

Officer Perez, of course, should have told Quinn and Garrison about respondent's request for counsel, and his failure to do so led to the exclusion of respondent's statements from the State's case-in-chief in the prosecution relating to the April 16 burglary. That much was required

by *Edwards*. But the context makes it clear that respondent's failure to reiterate his request for counsel to Detective Cota-Robles, even after Detective Cota-Robles gave respondent complete *Miranda* warnings, could not have been the result of any doubt on respondent's part that the police would honor a request for counsel if one were made. Moreover, Detective Cota-Robles tape-recorded his interview with respondent. That recording provided further assurance, subject to review by a court, that Detective Cota-Robles did not obtain respondent's agreement to talk by "badgering" him, but that respondent's willingness to discuss the April 16 burglary with Detective Cota-Robles was the product of his informed free will. In sum, the facts of this case, which may be fairly representative of cases in which police seek to question a suspect in connection with a separate investigation, demonstrate that the per se rule of *Edwards* is not needed in such cases to protect the suspect from police efforts to induce him to withdraw his prior invocation of counsel.

While *Edwards* is designed to protect the suspect's expressed wishes from being disregarded, it is by no means clear that extending *Edwards* to a case like this one would have that effect. In contrast to a case involving a single offense, the suspect's wishes are not so easily ascertained when different investigations are involved. Where only a single investigation is at issue, it may be unlikely that the suspect will experience an unprovoked change of heart regarding the advantages of speaking to the police without counsel, after he has first concluded that it is in his interest to seek the assistance of counsel. In that setting, when the suspect changes his mind after the police renew contact with him, the Court has concluded that the risk is high that the suspect's decision is the product of police compulsion, whether subtle or overt. On the other hand, where the suspect is faced with a separate investigation of a different crime, his judgment as to the need for counsel in connection with that investigation may reasonably be quite different from his judgment as to the need for counsel in connection with the first investigation. Cf. *United States* v. *Renda*, 567 F. Supp. 487, 490 (E.D. Va. 1983) (Renda was able "to differentiate between crimes he was willing to talk about in the absence of counsel and crimes he was unwilling to talk about in the absence of counsel.").

Even after invoking the right to counsel in connection with one matter, a suspect may have good reasons for wanting to speak with the police about the offenses involved in the new investigation, or at least to learn from the police what the new investigation is about so that he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel. The suspect might wish to provide the police with information that he believes is exculpatory, or he might wish to offer in that case " 'immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property [which] would redound to his benefit in the form of a reduced charge.' " *Edwards* v. *Arizona*, 451 U.S. at 491 n.1 (Powell, J., concurring in the result) (quoting *Michigan* v. *Mosley*, 423 U.S. 96, 109 n.1 (1975) (White, J., concurring in the result)). The difference in the suspect's desires with respect to the two investigations may turn on very real differences in the nature of the two investigations. To take the most obvious example, the suspect may know he is guilty of the crime involved in the first investigation, but not guilty of the crime involved in the second. If *Edwards* is applied to such cases, the police will not be free even to discuss the facts of the second investigation with the suspect in the absence of counsel—something that may actually work to the suspect's disadvantage by denying him the chance to resolve the second case quickly if he has an alibi or some other ready answer to the police suspicions.

The Court has recognized the risk that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigation activities, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests" (*Michigan* v. *Mosley,* 423 U.S. at 102). *Edwards* prevents investigators from discussing their case with a suspect once he has requested the assistance of counsel, unless the suspect himself initiates the discussion. While *Edwards* is based on the view that this ban on communication is necessary to prevent the risk that the suspect will be badgered into relinquishing his rights, it does have the disadvantage, from the suspect's point of view, of depriving him of information that may be relevent to his decision whether to provide his side of the story to the investigators. When a single investigation is involved, the suspect is aware that the investigation is proceeding, and he can initiate renewed communications if he wishes. But extending the *Edwards* rule to a new and unrelated investigation deprives the suspect of knowledge of the very existence of the new investigation, so that there may be no chance for him to exercise that choice.

2. Not only is the risk that suspects will be coerced into abandoning their Fifth Amendment rights considerably smaller where independent investigations are involved than in the situation typified by the *Edwards* case, but the interference with law enforcement activities that would result from applying the *Edwards* rule in this context is significantly greater than in cases like *Edwards*. It is one thing to require the officers who are involved in the investigation that led to the arrest and the administration of the *Miranda* warnings to be aware of the suspect's response to those warnings, and to require them to respect

his decision not to discuss the case in the absence of counsel. It is quite another matter to require officers who are pursuing different investigations, perhaps even for different prosecutorial entities, to determine whether a suspect has previously requested the advice of counsel in any other investigation in which he may have been implicated. The sort of careful record checking that is appropriate in title searches is simply out of place in the context of a fast-breaking criminal investigation. Cf. *Oregon* v. *Elstad,* 470 U.S. at 316 ("In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained."). Even if the officer conducting the new investigation does attempt to determine whether the suspect has asserted his right to counsel, that information may not be readily available or entirely reliable because of inadequacies in the custodian's recordkeeping. It is not reasonable to require an official of one jurisdiction to rely on the recordkeeping capabilities of an entirely different jurisdiction to protect the integrity of his investigation.[5]

We do not suggest that the admissibility of the fruits of the second interrogation should turn on whether the second investigator was aware of the original request for counsel. That approach puts a premium on ignorance, and thus encourages a lack of communication between investigating officials. It also ignores the basis for the *Miranda* warnings—to protect the suspect's right to choose whether he wishes to speak to the authorities with-

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[5] In this case the two investigations were both conducted by the Tucson police, although the district court did find that Cota-Robles, whose investigation was penalized, did "nothing wrong" (4/3/86 Tr. 50). We are particularly concerned, however, with the situation where federal investigators—from the FBI or the DEA, for example—may wish to interrogate suspects who are being held in state or local custody. In that situation, no purpose is served by penalizing the federal investigation for inadequacies in local recordkeeping.

out counsel. Instead, we believe the correct analysis recognizes that the separate investigation presents the suspect with a new situation, in which he may wish to make a different choice about whether to consult with counsel before he speaks. Cf. *Michigan* v. *Mosley*, 423 U.S. at 111 (White, J., concurring in the result). In that setting, the prospect that his choice will be different is sufficient to justify a simple inquiry to ascertain his wishes.

We also do not suggest that *Edwards* is inapplicable any time the new interrogation concerns an offense different from the one for which the suspect was originally arrested. Several courts have rejected a "separate offenses" limitation on *Edwards* on the ground that such a limitation can be manipulated by the investigators: "To rule otherwise might encourage law enforcement officers to select minor charges as a basis for an arrest, when major charges could be brought, in order to have more than one 'shot' at an arrestee who at first refuses to talk and asks for counsel." *State* v. *Taylor*, 56 Or. App. 703, 707-708, 643 P.2d 379, 382 (1982); accord *State* v. *Routhier*, 137 Ariz. at 97, 669 P.2d at 75; *Boles* v. *Foltz*, 816 F.2d 1132, 1141 (6th Cir. 1987) (Gibson, J., dissenting); *United States ex rel. Karr* v. *Wolff*, 556 F. Supp. 760, 765 (N.D. Ill. 1983), vacated on other grounds, 732 F.2d 615 (7th Cir. 1984). See also *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125-126 & n.7 (7th Cir. 1987); *United States* v. *Renda*, 567 F. Supp. 487 (E.D. Va. 1983); *Radovsky* v. *State*, 296 Md. 386, 464 A.2d 239 (1983); *People* v. *Hammock*, 121 Ill. App. 3d 874, 460 N.E.2d 378 (1984), cert. denied, 470 U.S. 1003 (1985). Our position does not turn on the fact that the new interrogation relates to a different crime, but on the fact that it is part of an independent investigation. The "independent investigation" limitation on *Edwards* affords no such opportunity for prosecutorial manipulation, and where the subsequent interrogation has occurred in the course of an independent investigation, the courts have

generally refused to apply the *Edwards* rule. *State* v. *Willie*, 410 So. 2d 1019, 1026-1027, 1028 (La. 1982); *State* v. *Harriman*, 434 So. 2d 551, 553-554 (La. Ct. App. 1983); *McFadden* v. *Commonwealth*, 225 Va. 103, 300 S.E.2d 924, 927 (1983); *State* v. *Cornethan*, 38 Wash. App. 231, 236, 684 P.2d 1355, 1359 (1984). See *State* v. *Newton*, 682 P.2d 295, 298 (Utah 1984) (separate investigation; counsel provided before second inquiry).

In weighing the costs of extending the *Edwards* rule to cases involving independent investigations, it is important to keep in mind the vital role of police interrogation in furthering law enforcement. As this Court has recognized, " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine,* 475 U.S. 412, 426 (1986) (citations omitted); see also *Oregon* v. *Elstad,* 470 U.S. at 305; *United States* v. *Washington,* 431 U.S. 181, 186-187 (1977); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 225 (1973). Because of the severe costs it would impose on law enforcement, any rule that forbids police interrogation bears a heavy burden of justification. While the Court concluded that the problem at issue in *Edwards* was sufficiently serious to carry that burden, the problem presented in the present context is not. Accordingly, in light of the costs to law enforcement, this Court should refuse to extend the prophylactic rule of *Edwards* to a class of cases like this one, which does not pose the risk that led to the fashioning of the rule.

This Court has followed a similar approach in applying *Miranda* and *Edwards* in other contexts. Because *Miranda* and *Edwards* establish prophylactic rules and do not directly enforce constitutional prohibitions, the Court has

weighed the benefits of applying those rules against their costs each time it has considered whether to apply the rules to a new class of cases. See, *e.g., New York* v. *Quarles,* 467 U.S. 649, 657 (1984); *Oregon* v. *Elstad,* 470 U.S. at 308-309; *Michigan* v. *Tucker,* 417 U.S. 433, 450-451 (1974). For example, in *Connecticut* v. *Barrett,* No. 85-899 (Jan. 27, 1987), slip op. 5, the Court pointed out that the *Edwards* rule, like other aspects of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." In the situation presented in that case—where the suspect asked for counsel before making a written statement, but agreed to make an oral statement without counsel—the Court concluded that the benefits of applying the rule in *Edwards* did not outweigh its costs. The Court therefore held that *Edwards* did not bar oral interrogation, even though the suspect had requested counsel for other purposes. The same analysis should apply in this case, where respondent invoked counsel only with respect to the April 16 burglary.

In previous cases, this Court has rejected suggestions that the admissibility of a suspect's statements in an *Edwards*-type case should be based on a consideration of all the factors in the particular case. See, *e.g., Oregon* v. *Bradshaw,* 462 U.S. at 1048-1049 (Powell, J., concurring in the judgment); *Edwards* v. *Arizona,* 451 U.S. at 487-488 (Burger, C.J., concurring in the judgment); and *id.* at 491 (Powell and Rehnquist, JJ., concurring in the result). Instead, the Court has preferred the safeguards of a "bright-line" rule that guards against even the possibility of the subtle coercive tactic of wearing down the suspect's will to resist by repeated inquiries. See, *e.g., Smith* v. *Illinois,* 469 U.S. at 98. But where the subsequent police inquiry relates to an investigation that is independent of the one in which the request for counsel was made, the justification for that "bright-line" rule is greatly reduced.

Therefore, once it is clear that the police inquiry at issue relates to an investigation separate from the one in which the suspect requested counsel, the Court should not apply the special rule of *Edwards*, but should rely on the traditional test for waiver. If the government can satisfy its burden of showing that the suspect made a knowing and intelligent waiver of his right to the assistance of counsel in connection with the new investigation, the statements made by the suspect in the course of that investigation should be admitted.

Excluding statements relating to charges that arise out of the initial investigation, while admitting statements relating to charges that arise out of an independent, second investigation, is consistent with this Court's approach in the Sixth Amendment context, see *Maine* v. *Moulton*, 474 U.S. 159 (1985). In *Moulton*, an informant elicited statements from an indicted defendant that were relevant both to the offenses for which the defendant had been indicted and to other, uncharged offenses. The Court held that the Sixth Amendment barred the admission of the defendant's statements in connection with the charges that had already been initiated. The Court refused, however, to bar the use of the statements in any later prosecutions that might be brought in connection with the offenses that were not already the subject of formal charges at the time the statements were made. See 474 U.S. at 179-180 & n.15.

The same principle should apply here by analogy. The statements obtained in the course of the investigation of the April 16 burglary were suppressed because of the violation of *Edwards* in the course of that investigation. Those statements were held to be inadmissible, except for impeachment purposes, in the trial on those charges, and if offered at the trial on the April 15 burglary, they would be inadmissible in that proceeding as well. On the other hand, the statements respondent made in the course of the independent investigation should be admissible in the trial of

the charges that were the subject of that investigation—the charges arising from the April 15 burglary. Just as the rule of exclusion under the Sixth Amendment does not apply with respect to matters that have not yet been made the subject of a formal charge, the rule of exclusion under the principles of *Miranda* and *Edwards* should not be applied with respect to an investigative proceeding in which the suspect has not yet requested the assistance of counsel.

CONCLUSION

The judgment of the Arizona Court of Appeals, Division Two should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney

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